WHITE & CASE LLP
FERNANDO L. AENLLE-ROCHA (State Bar No. 129515)
DEVON MYERS (State Bar No. 240031)
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071-2007
Tel: (213) 620-7700
Fax: (213) 452-2329
faenlle-rocha@whitecase.com
dmyers@whitecase.com

GEORGE J. TERWILLIGER III (Admitted Pro Hac Vice)
DARRYL S. LEW (Admitted Pro Hac Vice)
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Tel: (202) 626-3600
Fax: (202) 639-9355
gterwilliger@whitecase.com
dlew@whitecase.com

Attorneys for Defendants
Consortium de Réalisation S.A. and CDR Entreprises

CLEARY GOTTLIEB STEEN & HAMILTON LLP
LAWRENCE B. FRIEDMAN (Admitted Pro Hac Vice)
AVRAM E. LUFT (Admitted Pro Hac Vice)
One Liberty Plaza
New York, New York 10006
Tel: (212) 225-2000
Fax: (212) 225-3999
lfriedman@cgsh.com
aluft@cgsh.com

Attorneys for Crédit Lyonnais S.A.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CREDIT LYONNAIS, et al., Defendants.	Case No. CR 03-760-ODW **CRÉDIT LYONNAIS S.A., CONSORTIUM DE REALISATION S.A., AND CDR-ENTREPRISES' OPPOSITION TO AIG RETIREMENT SERVICES, INC.'S MOTION TO UNSEAL INDICTMENT** **[DECLARATION OF FERNANDO L. AENLLE-ROCHA AND EXHIBITS FILED CONCURRENTLY HEREWITH]**

DATE:	**AUGUST 29, 2011**
TIME:	**10:00 A.M.**
COURTROOM:	**11**
PRETRIAL CONF.:	**NONE**
TRIAL DATE:	**NONE**

Crédit Lyonnais S.A. ("Crédit Lyonnais" or "CL"), Consortium de Réalisation S.A. ("CDR"), and CDR Entreprises, formerly known as Altus Finance S.A., ("CDR-E" and, together with CDR, the "CDR Parties"), hereby oppose AIG Retirement Services, Inc.'s, formerly known as SunAmerica Inc. ("AIG"), Motion to Unseal Indictment.

AIG's Motion should be denied for several reasons. First, the sealed Indictment which AIG seeks is irrelevant to its claims in the civil action styled AIG Retirement Services, Inc. v. Altus Finance S.A., et al., Case No. CV 05-1035-JFW (CWx). Second, AIG fails to articulate a legitimate need for disclosure of the sealed Indictment. Finally, under an analysis of both the First Amendment and common law rights of access, the privacy interests of individuals named in the Indictment, but never prosecuted, and the public interest in respecting bargained-for binding plea agreements outweigh AIG's request for expansive discovery of an irrelevant and inadmissible sealed Indictment.[1]

Respectfully submitted,

Dated: August 8, 2011

WHITE & CASE LLP

By: */s/ Fernando L. Aenlle-Rocha*
Fernando L. Aenlle-Rocha

Attorneys for Consortium de Réalisation S.A. and CDR Entreprises, formerly known as Altus Finance S.A.

Dated: August 8, 2011

CLEARLY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Avram E. Luft*
Avram E. Luft

Attorneys for Crédit Lyonnais S.A.

[1] In filing this opposition, CL and the CDR Parties do not intend to and do not waive any of their rights or defenses under Article 15 of the French Civil Code in this or any other proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL RULES

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court should deny AIG's latest attempt to gain access to the sealed Indictment in this case.[2] In its Motion, AIG argues the Court should unseal the Indictment on the ground that it would be in the "public" interest notwithstanding that the true purpose for which AIG seeks the Indictment is to conduct further speculative discovery in private litigation with the intent to use the Indictment against Defendants at trial. What AIG omits from its Motion is that this request is the latest in a series of similar requests AIG has made to other courts and governmental entities, all of which have been correctly denied.[3] This Court should

[2] As a preliminary matter, AIG's motion remains procedurally defective. As a non-party to this criminal action, AIG should move to intervene in the action before the relief it seeks can be granted. In re Copley Press, Inc., 518 F.3d 1022, 1025 (9th Cir. 2008); United States v. Smith, 776 F.2d 1104, 1106 (3d. Cir. 1985). As a result, the Court, therefore, should deny AIG's Motion as procedurally improper.

Should the Court decline to deny the Motion as improper, CL and the CDR Parties understand this Court may recuse itself from hearing this matter. CL and the CDR Parties understand this Court may recuse itself from hearing this matter. At the July 1, 2011, hearing regarding AIG's most recent motion to unseal grand jury related pleadings and testimony in the action styled AIG Retirement Services, Inc. v. Altus Finance S.A., et al., Case No. CV 05-1035-JFW (CWx), the Honorable John F. Walter stated that this Court may choose to rule on AIG's motion to unseal the sealed Indictment or, should this Court recuse itself from hearing such a motion, "the [C]entral [D]istrict has procedures in place to reassign the motion." Aenlle-Rocha Decl. at Ex. A at 47. In the event this Court decides to recuse itself from deciding this Motion, it would serve judicial efficiency to assign this Motion to Judge Walter, who is already familiar with the procedural history and factual and legal issues of this case. Alternatively, if this Court elects to hear the Motion, it may make a preliminary finding as to whether a public right of access to the sealed Indictment exists and refer the Motion to Judge Walter for final determination as to whether AIG has demonstrated a legitimate need for disclosure of the sealed Indictment given his familiarity with that action.

[3] AIG has moved on three prior occasions for the release of grand jury materials. All three motions have been denied. AIG has also moved to compel the production of documents relating to confidential communications between the defendants and the U.S. Attorney's Office. That motion also was denied. Aenlle-Rocha Decl. at Ex. B at 156.

similarly deny AIG's Motion because it has no more merit than any of the previously denied requests.

On May 23, 2011, AIG asked the Honorable John F. Walter, who presides over the civil action styled AIG Retirement Services, Inc. v. Altus Finance S.A., et al., Case No. CV 05-1035-JFW (CWx) ("Civil Case"), to unseal the original Indictment in this matter. In its motion to Judge Walter, AIG also sought to unseal other materials from a related criminal miscellaneous matter that preceded this criminal action, styled In re Grand Jury Investigation, Case No. CR Misc. 03-158-JFW ("Grand Jury Proceeding") on the same grounds raised here. Declaration of Sierra Elizabeth ("Elizabeth Decl.") at Ex. 9. Judge Walter denied AIG's motion to unseal documents in the Grand Jury Proceeding, concluding that AIG's "vague, generalized, and speculative assertions are completely insufficient to demonstrate a legitimate need" for sealed court documents. Declaration of Fernando L. Aenlle-Rocha ("Aenlle-Rocha Decl.") at Ex. A at 59. Judge Walter denied AIG's request to unseal the Indictment because he did not have jurisdiction over this matter and found that AIG should have directed that portion of its request to this Court.[4] Aenlle-Rocha Decl. at Ex. A at 14.

The Indictment at issue was sealed in 2003 at the Government's request following its return by the grand jury. Aenlle-Rocha Decl. ¶ 2. It remained under seal thereafter and was ordered permanently sealed in this matter pursuant to the terms of: (1) the binding plea agreement between the Government and CL, the CDR Parties, MAAF, and Jean-Claude Seys, and (2) the non-criminal settlement agreement between the Government and Artemis S.A. ("Artemis"). Government's Opposition to AIG Retirement Services, Inc.'s Motion to Unseal Indictment

[4] Prior to the hearing on AIG's motion to unseal pleadings and grand jury testimony filed in the Civil Case, Judge Walter had the Grand Jury Proceeding transferred to himself because no judge was assigned to the matter following Judge Tevrizian's retirement. Accordingly, Judge Walter had authority to deny AIG's request for the sealed pleadings and testimony in the Grand Jury Proceeding and to order the disclosure of the grand jury testimony of Francois Pinault.

("Government's Opp'n") at Ex. A at 1-2. Upon entry of the aforementioned agreements, the Indictment was superseded by a First Superseding Information, the operative charging instrument upon which the plea and settlement agreements were based. Aenlle-Rocha Decl. ¶ 3.

Against this background, the Court should deny AIG's Motion because it advances no legally defensible ground to justify unsealing the Indictment. AIG seeks access to the sealed Indictment to: (1) give it to its experts so they may make speculative predictions about how the United States Attorney's Office ("USAO") or the Board of Governors of the Federal Reserve System ("Federal Reserve") might have acted had certain information come to light years earlier; and (2) glean material with which to unfairly tarnish CL and the CDR Parties in its upcoming trial in the Civil Case. Neither of these "needs" is persuasive.

As an initial matter, the sealed Indictment is neither admissible in the Civil Case nor relevant to AIG's claims. An indictment is not evidence and has no probative value. Further, the sealed Indictment was not the basis for any of the pleas entered in the criminal action and its allegations do not address any allegedly fraudulent conduct purportedly directed by the defendants in the Civil Case ("civil defendants") at AIG.[5] Additionally, given that discovery in the Civil Case is closed, the Indictment is unlikely to lead to any admissible evidence relevant to AIG's claims.

AIG's speculative claim that the allegations in the sealed Indictment might possibly lead to evidence to support its theories about how the USAO or Federal Reserve might have acted is insufficient to justify disclosure. Trying to predict how

[5] As set forth in CL and the CDR Parties' opposition to AIG's most recent motion to disclose grand jury material, no AIG representative ever testified before the grand jury and AIG has presented no evidence that the grand jury investigation focused on any fraud allegedly perpetrated against AIG by any of the defendants in this action. Opposition to AIG's Motion for Release of Grand Jury Materials, AIG Retirement Services, Inc. v. Altus Finance S.A., Case No. CV 05-1035-JFW (CWx), Docket #576, filed April 12, 2011.

a government agency would have exercised its discretion years earlier in hypothesized circumstances is inherently speculative and is not made less so by disclosing a sealed document created years after the events at issue. Judge Walter and Magistrate Judge Woehrle, who oversaw the extensive discovery in the Civil Case, and the Federal Reserve have reached that conclusion. For example, Judge Walter previously excluded the testimony of AIG's expert witness, who sought to "predict" that the California Insurance Commissioner would have acted differently if information had come to light earlier. Magistrate Judge Woehrle denied AIG's motion to compel disclosure of documents relating to communications between the civil defendants and the USAO, which involved the same claim of relevance AIG makes here. Aenlle-Rocha Decl. at Ex. B at 156. And the Federal Reserve recently denied a virtually identical request by AIG to obtain Confidential Supervisory Information ("CSI") from the Federal Reserve concerning the Federal Reserve's investigation undertaken from 1999 to 2003. Aenlle-Rocha Decl. at Ex. C at 240.

Importantly, AIG does not seek to vindicate any public interest through this Motion to obtain the sealed Indictment, but instead moves to advance its own private litigation interests. Contrary to AIG's broad assertions that it is entitled to access the sealed Indictment, any right of access it has under the common law or First Amendment is qualified, not absolute. In analyzing these rights of access, courts balance the interests of the party seeking access against the countervailing interests in maintaining the document under seal. Here, the privacy interests of individuals named in the Indictment, but never prosecuted, and the public interest in respecting plea agreements and negotiated settlements outweigh any speculative private litigation interest AIG may have in accessing the sealed Indictment.

In sum, AIG's Motion seeks to unseal an Indictment against both the public interest and the interests of private individuals, all in an effort to obtain unproven allegations that lack evidentiary value. AIG's request to unseal the Indictment after the close of discovery in the Civil Case is nothing more than an impermissible

"fishing expedition" and indicative of AIG's persistent overreaching for documents to which it is not entitled. Accordingly, this Motion should be denied.

II.

FACTS

A. Grand Jury Proceeding and Sealed Indictment

In 2002, a federal grand jury was impaneled to hear evidence of alleged violations of federal laws related to the rehabilitation of Executive Life Insurance Company. On July 30, 2003, the grand jury returned an Indictment that was sealed at the USAO's request that same day. Aenlle-Rocha Decl. at ¶ 2. The Indictment names not only parties that eventually entered plea or settlement agreements that are public, but also individuals who were never prosecuted and whose identity and involvement in this Indictment have remained under seal. Id.

On December 17, 2003, certain civil defendants in AIG's Civil Case, namely CL, CDR-E, and MAAF, along with a third-party witness Jean-Claude Seys, executed a binding plea agreement with the USAO (the "plea agreement"). As part of the plea agreement, the USAO dismissed the charges in the Indictment against CL and the CDR Parties. Elizabeth Decl. at Ex. 2 at 101. The USAO also undertook the obligation to move for an order to permanently seal the Indictment. Elizabeth Decl. at Ex. 2 at 105-06. The USAO reserved the right to unseal the Indictment if charges in any superseding indictment were time-barred. Id.

On January 21, 2004, the Court accepted the terms of the plea agreement and ordered that the Indictment remain under seal. Government's Opp'n at Ex. A at 1-2. Today, the Indictment remains sealed and in the custody of this Court. Aenlle-Rocha Decl. at ¶ 2. As acknowledged by AIG, CL and the CDR Parties do not possess a copy of the Indictment, although they were afforded the opportunity to inspect it in 2003. Aenlle-Rocha Decl. at ¶ 4.

B. The Court in the Civil Case Has Consistently Rejected AIG's Repeated Attempts To Obtain Grand Jury and Indictment-Related Information

On May 2, 2011, the parties held a meet and confer related to this Motion. AIG stated that it intended to use the Indictment to inform the testimony of an expert witness on the hypothetical reaction of the USAO and Federal Reserve if the alleged fraud had been disclosed in 1993, including whether the civil defendants' interest in the insurance company assets would have been divested. Aenlle-Rocha Decl. at ¶ 8.

On May 23, 2011, AIG filed a motion in the Civil Case to unseal the sealed Indictment in this case and pleading and grand jury testimony from the Grand Jury Proceeding. Elizabeth Decl. at Ex. 9. On July 1, 2011, Judge Walter denied AIG's motion (with the exception the grand jury testimony of Francois Pinault) and declined to unseal the Indictment.[6] Aenlle-Rocha Decl. at Ex. A at 47. At the same hearing, Judge Walter also denied AIG's request to unseal an August 15, 2003 order applying the crime-fraud exception to communications between Artemis and its attorneys and related pleadings in the Grand Jury Proceeding. Aenlle-Rocha Decl. at Ex. A at 59. In so ruling, Judge Walter rejected arguments identical to those put forth by AIG in this Motion. Judge Walter concluded that AIG had no First Amendment Right to the sealed order and related sealed pleadings, finding that AIG "feigns concern over the public interest," but "merely wants these materials for its own private litigation" and that "the incremental value and public access in this case is minimal in comparison to significant privacy interests."

[6] The May 23 motion was AIG's third attempt to gain access to grand jury materials that originated in the Grand Jury Proceeding and were disclosed on a limited basis in a different civil case. The court had denied both of AIG's previous motions. In his most recent and final ruling, Judge Walter denied AIG's request for grand jury materials finding (with the exception of the Pinault testimony) even where AIG bore a "lesser burden in showing justification for the release of the materials," AIG did not establish "a sufficient particularized and compelling need for the disclosure." Aenlle-Rocha Decl. at Ex. A at 32-37.

Aenlle-Rocha Decl. at Ex. A at 54-55. Judge Walter also found that AIG had no common law right of access where AIG's purported justifications for accessing the sealed pleadings (the same arguments put forth in this Motion) were "vague, generalized, and speculative assertions . . . completely insufficient to demonstrate a legitimate need." Aenlle-Rocha Decl. at Ex. A at 59.

Judge Walter's denial of AIG's motion to unseal pleadings and grand jury testimony is only the most recent ruling against AIG's various attempts to gather confidential and sealed documents. In late June 2011, AIG attempted to obtain documents relating to confidential communications between the civil defendants and the USAO regarding information requests and responses sent as part of the USAO's investigation. Magistrate Judge Woehrle denied AIG's motion, citing "fundamental concerns about the confidentiality of a criminal investigation and the communications related to that investigation," and concluded that AIG had failed to show that such evidence would be relevant to its claims. Aenlle-Rocha Decl. at Ex. B at 156.

III.

ARGUMENT

A. The Sealed Indictment Is Irrelevant to AIG's Claims in the Civil Case

AIG's Motion should be denied because the Indictment AIG seeks to unseal is beyond the scope of permissible discovery. "Litigants 'may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.'" Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 635 (9th Cir. 2005) (citing Fed. R. Civ. P. 26(b)(1)). "Relevant information for purposes of discovery is information reasonably calculated to lead to the discovery of admissible evidence." Id. (internal quotations and citations omitted). "District courts have broad discretion in determining relevancy for discovery purposes." Id. (affirming the magistrate judge's limitation on discovery) (citation omitted). Moreover, courts have a duty to pare down overbroad discovery requests by

weighing the value of the material sought against the burden of providing it and considering whether the discovery will further society's interest for seeking truth. Masterson v. Huerta-Garcia, No. 2:07-cv-1307-KJD-PAL, 2010 WL 4053924 at *4 (E.D. Cal. Sept. 30, 2010).

Here, the document at issue is a sealed Indictment that is not under the control of any of the litigants in the Civil Case; rather, it is an official record in the custody of the Court. It is also not a document prepared by any of the parties to the litigation, but is rather a set of allegations prepared by the USAO and returned by a federal grand jury.

There is no sound basis to allow the unsealing and production of the Indictment to be used in the pending Civil Case. "Neither tradition nor logic supports public access to inadmissible evidence." United States v. McVeigh, 119 F.3d 806, 813 (10th Cir. 1997). The sealed Indictment, which is nothing more than a collection of allegations, is not reasonably calculated to lead to the discovery of admissible evidence, even assuming that the discovery period in the Civil Case had not already closed (which it did on July 1, 2011). Fed. R. Civ. P. 26(b)(1). For this reason, it is well-established that an indictment is not evidence and has no probative value at trial. See, e.g., United States v. Locklin, 530 F.3d 908, 912 (9th Cir. 2008) (noting that the district court correctly instructed the jury that the First Superseding Indictment was not evidence); Scholes v. African Enter., Inc., 854 F. Supp. 1315, 1324 (N.D. Ill. 1994) (declining to consider an indictment as part of the evidentiary record on summary judgment because the indictment contained mere allegations).

Further undercutting any possible probative value the sealed Indictment could possess is that the sealed Indictment was not the operative charging instrument in this case. With respect to CL and CDR-E, the allegations in the sealed Indictment were superseded by a First Superseding Information, which formed the basis for the plea agreement. Aenlle-Rocha Decl. at ¶ 3. For the individuals who were never prosecuted, the allegations were dismissed. Id.

Moreover, pursuant to the plea agreement entered into between CL, the CDR Parties, MAAF, and the USAO, the USAO agreed to dismiss all charges in the sealed Indictment that were not resolved by the plea agreement. Elizabeth Decl. at Ex. 2 at 101.

As noted above, although not expressly stated in Plaintiff's Motion, Memorandum of Points and Authorities, or Proposed Order, AIG stated in its May 2, 2011 meet and confer that it intended to use the sealed Indictment to inform the testimony of an expert witness on the hypothetical reaction of the USAO and Federal Reserve if the alleged fraud had been disclosed in 1993, including whether the civil defendants' interest in the insurance company assets would have been divested. Aenlle-Rocha Decl. ¶ 8. AIG's asserted "legitimate need," however, is based solely on its speculation that the Indictment's "allegations [] are more extensive and more wide-ranging than the plea agreements themselves." Pl.'s Mem. of P. & A. at 9.

Even if true, this argument fails to recognize that the sealed Indictment contains nothing more than unproven allegations—a point made more significant by the fact that none of the civil defendants pleaded guilty to charges contained in the sealed Indictment. Moreover, Judge Walter, in the Civil Case, previously disallowed the very type of speculative "expert" testimony AIG seeks to inform and support by obtaining the sealed Indictment. Aenlle-Rocha Decl. at Ex. D at 256, n.22 ("In light of [the proposed expert's] own testimony that the Commissioner himself is the best person to speak to how the Commissioner would have acted in the Spring of 1993, the Court finds that [the proposed expert's] alleged 'specialized knowledge' is based on nothing more than his personal or subjective beliefs and unsupported speculation."). On appeal, the Ninth Circuit affirmed Judge Walter's ruling to exclude such testimony. AIG Retirement Services, Inc. v. Altus Finance S.A., Nos. 07-56019, 07-56679, 2010 WL 510620, *1 (9th Cir. Feb. 9, 2010) (unpublished).

Given the speculative purpose for which AIG seeks the sealed Indictment and the minimal, if any, probative value of any allegations contained therein, the sealed Indictment is irrelevant to AIG's claims in the Civil Case.[7] Accordingly, AIG's Motion should be denied.

B. The Indictment Should Remain Permanently Sealed

AIG incorrectly argues that it has a right of access to the sealed Indictment. As the Government asserts in its opposition to AIG's Motion, there is no general right to access "a sealed indictment that has been superseded and never been the subject of an appearance by any defendant . . . . Where no defendant is ever arrested on or appears on an indictment, none of [the Federal Rules of Criminal Procedure] require that the indictment be unsealed." Government's Opp'n at 8-9.

AIG relies on United States v. Kott, 380 F. Supp. 2d 1122 (C.D. Cal. 2004) to argue that it has a right of access to the sealed Indictment. But the district court in Kott held only that the balancing of interests under the First Amendment weighed in favor of public access to the indictment in that particular case, not that there was a general right to access. Id. at 1125 ("a court may only maintain a sealing order where the right of access is overcome by an overriding right or interest, essential to preserve higher values.") (citation omitted).

Further, AIG is mistaken in arguing that there is "no legal basis to keep the Indictment permanently sealed." Pl.'s Mem. of P. & A. at 6. Although the Ninth Circuit has recognized both a First Amendment right of access to court documents and a common law right of access, neither right compels this Court to unseal the sealed Indictment. "[B]oth the common law and First Amendment standards

[7] AIG's current Motion is just the latest in a series of groundless attempts to obtain confidential records of scant evidentiary value. Not surprisingly, AIG has been rebuffed in these efforts. As mentioned, both the Federal Reserve and Magistrate Judge Woehrle rejected similar speculative justifications offered in support of AIG's attempts to seek information from prior federal investigations. Aenlle-Rocha Decl. at Ex. C at 239 (AIG has "not identified how the information [it] seek[s] is relevant to any issue in [its] claim against CL in this litigation."); Ex. B at 156.

ultimately involve a balancing test," McVeigh, 119 F.3d at 812, and under both standards the interests weigh in favor of maintaining the Indictment under seal.

1. AIG Does Not Have a Right of Access to the Sealed Indictment under the First Amendment

AIG has no First Amendment right to access the sealed Indictment in this case. To evaluate the First Amendment right of access, courts apply the "experience and logic" test and evaluate: (1) whether the document has historically been open and available to the public, and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (citation omitted). The Supreme Court has made clear that, even where the First Amendment's qualified right of access attaches to a public record, the right "is not absolute." Id. at 9 (citation omitted). If a qualified First Amendment right of access is found, "the district court may then seal the documents only if 'closure is essential to preserve higher values and is necessary to serve that interest.'" McVeigh, 119 F.3d at 812-13 (citing Press-Enterprise Co., 464 U.S. at 510).

AIG relies heavily on the district court's decision in Kott, 380 F. Supp. 2d at 1122, but fails to address the obvious distinctions between the two cases. In Kott, the First Amendment right of access was applied to a news organization, Dow Jones on behalf of The Wall Street Journal, for the purpose of informing the public so that "it is armed with enough information to know what questions to ask." Id. at 1124. Dow Jones sought the sealed indictment to "serve as a check upon the judicial process," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982), where it questioned the "fairness and propriety of the plea agreement." Aenlle-Rocha Decl. at Ex. E at 275-76.

In stark contrast, AIG seeks the sealed Indictment for personal benefit and consumption, not for public information and dissemination. Consequently, the First Amendment value of informing the public is not at issue in this proceeding. As

Judge Walter accurately observed regarding AIG's efforts to gain access to other sealed court documents, "while AIG feigns concern over the public interest and the functioning of the criminal justice system, it merely wants these materials for its own private litigation interests, not to serve as a curb on prosecutorial misconduct or to educate the public." Aenlle-Rocha Decl. at Ex. A at 54.

Additionally, Kott did not present the same privacy concerns at issue here. Two individuals in Kott were named in the sealed Indictment — Kott and one other defendant. Kott, 380 F. Supp. 2d at 1123. Here, there are multiple individuals named in the sealed Indictment who were never prosecuted and whose privacy interests are at stake, as discussed below.[8] Aenlle-Rocha Decl. ¶ 2. These individuals will not have the opportunity to appear before this Court to oppose AIG's Motion and protect their privacy interests.

Finally, unlike Kott, the USAO here moved to permanently seal the Indictment pursuant to a negotiated plea agreement that the Court approved. There was no such provision in the plea agreement between Kott and the USAO. Aenlle-Rocha Decl. at Ex. F at 284-343. The plea agreement in Kott compelled the USAO not to prosecute any additional charges arising out of the transactions alleged in the indictment, but did not obligate the USAO to move to permanently seal the indictment. Id. at 300-01. In contrast, CL, the CDR Parties, MAAF, and Mr. Seys bargained for and secured the USAO's agreement to move to seal the Indictment permanently. Elizabeth Decl. at Ex. 2 at 105-06. Moreover, in accepting the guilty pleas, the Court agreed to fulfill the parties' agreements to seal the Indictment, pursuant to Fed. R. Crim. P. 11(c)(1)(C).[9] See Santobello v. New York, 404 U.S.

[8] "As the court could determine from a review of the Original Indictment, it contains specific allegations of criminal conduct by individuals other than those charged in the First Superseding Indictment or who entered guilty pleas or entered into settlement agreements." Government's Opp'n at 19.

[9] The plea agreements in this action were effectively contracts between the Government and the Defendants that executed them, and the Court which accepted their terms, pursuant to Fed. R. Crim. P. 11(c)(1)(C). See United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000); United States v. Keller, 902 F.2d 1391, 1393

257, 262, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). The USAO also agreed to permanently seal the Indictment in its non-criminal settlement agreements with Artemis, Francois Pinault, Patricia Barbizet, Marie-Christine de Percin, and Emmanuel Cueff. Aenlle-Rocha Decl. at Ex. G at 361-62.

Maintaining the sealed Indictment is not merely a matter of importance for the parties to these plea agreements and settlements. Failure to honor the terms of the plea agreement by unsealing the Indictment may have a chilling effect on future plea agreements and settlements in other cases. See McVeigh, 119 F.3d at 814 (finding adequate basis for the district court's decision to redact a sealed severance motion requested by a news organization as "necessary to avoid chilling the sort of candor needed to assess whether separate trials were necessary") (citation omitted); United States v. Corbitt, 879 F.2d 224, 238 (7th Cir. 1989) (recognizing that providing a presentence report to a third party could have a "chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report") (citing U.S. Dept. of Justice v. Julian, 486 U.S. 1, 12, 108 S. Ct. 1606, 100 L. Ed. 2d 1 (1988)).

a. AIG Does Not Have a Legitimate Need for the Sealed Indictment

AIG claims it has "legitimate need" for the sealed Indictment. AIG claims it

---

(9th Cir. 1990) ("Plea agreements are contractual in nature and are measured by contract law standards.") (citation omitted). In construing an agreement, a court must determine what the defendant "reasonably understood to be the terms of the agreement." See Keller, 902 F.2d at 1393 (citing United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985)). Because the Court accepted the terms of the binding agreements, CL and the CDR Parties respectfully submit that the Court should continue to enforce the bargained-for terms of the parties' plea and settlement agreements and deny AIG's motion.

needs the Indictment "to better understand the scope and extent of Defendants' criminal conspiracy and the government's response to it." Pl.'s Mem. of P. & A. at 9. AIG further claims that "the Indictment will shed light on both the USAO's views of the relationships between the Defendants and the scope and nature of the Defendant's unlawful activity" arguing that these issues "are relevant to understanding how the Federal Reserve Board and the USAO would have treated the Defendants had the fraud come to light in 1994." Pl.'s Mem. of P. & A. at 9. Judge Walter rejected identical arguments at the July 1, 2011 hearing when he denied AIG's request for access to sealed court documents and found that "[t]hese vague, generalized, and speculative assertions are completely insufficient to demonstrate a legitimate need and certainly are insufficient to demonstrate that the information cannot be obtained elsewhere, especially given the extensive and lengthy discovery that has been conducted . . . ." Aenlle-Rocha Decl. at Ex. A at 59. AIG puts forth the same vague and speculative arguments before this Court in the hopes that a different judge will render a different result. However, AIG's inadequate justifications for obtaining the sealed Indictment must fail when weighed against the interests of honoring bargained-for plea and settlement agreements, and protecting the privacy interests of individuals named in the sealed Indictment who were never prosecuted.

b. That Facts in the Sealed Indictment Have Become Public Does Not Impact the Sealed Indictment

AIG mistakenly relies on the existence of a news article publishing information regarding the sealed Indictment to argue that the Indictment no longer needs to be sealed. Rather than bolster AIG's specious argument for disclosure, AIG's access to publicly available facts from the Indictment and volumes of information regarding the USAO's investigation and negotiations with CL and the CDR Parties support maintaining the sealed Indictment. That information regarding the sealed Indictment is publicly available from news sources undercuts

rather than bolsters AIG's claim of legitimate need for the sealed Indictment. As Judge Walter explained when he denied AIG's motion to unseal pleadings and grand jury testimony, "[i]f one carefully reviews the plea agreements, settlement agreements, and other publicly-filed documents in the criminal case, the full scope, details, and nature of the conspiracy are fully discussed and the roles of the co-conspirators, charged and uncharged, are clearly described. . . . [T]he incremental value and public access in this case is minimal in comparison to the significant privacy interests that would be jeopardized." Aenlle-Rocha Decl. at Ex. A at 55.

2. AIG Does Not Have a Common Law Right of Access to the Sealed Indictment

"Historically, courts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)). "[T]he interest of citizens in 'keep[ing] a watchful eye on the workings of public agencies'" justifies this right. Id. (citing Nixon, 435 U.S. at 598). Although the Ninth Circuit recognizes a presumption in favor of the common law right of access, Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003), courts recognize that this right of access is not absolute. See Nixon, 435 U.S. at 598 ("[T]he right to inspect and copy judicial records is not absolute"); Kamakana, 447 F.3d at 1178 ("[A]ccess to judicial records is not absolute"); In re Copley Press, 518 F.3d 1022, 1029 (9th Cir. 2008) (recognizing a common law right of access, but finding that "this right is not absolute") (citation omitted).

In determining whether to grant access to sealed documents, courts must "'conscientiously balance[] the competing interests of the public and the party who seeks to keep certain judicial records secret." Kamakana, 447 F.3d at 1179 (citing Foltz, 331 F.3d at 1135). Moreover, the Supreme Court has recognized that the

right of access does not permit improper use of materials including for "private spite, [to] promote public scandal," or as a "source[] of business information that might harm a litigant's competitive standing." Nixon, 435 U.S. at 598 (citation omitted); see United States v. Amodeo, 71 F.3d 1044, 1051 (2d Cir. 1995) ("Commercial competitors seeking an advantage over rivals need not be indulged in the name of monitoring the courts, and personal vendettas similarly need not be aided."). Additionally, "privacy rights may outweigh the public's interest in disclosure." United States v. Smith, 776 F.2d 1104, 1113 (3d Cir. 1985) (denying request to unseal bill of particulars because protecting the privacy interest of third parties named in the document outweighed the public's interest in access).

Here, AIG fails to identify any public interest in releasing the sealed Indictment, let alone a legitimate interest. The purpose of its request is not of the type contemplated by the common law right of access, such as a "citizen's desire to keep a watchful eye on the working of public agencies" or "a newspaper publisher's intention to publish information concerning the operation of government." Nixon, 435 U.S. at 598 (citations omitted). Rather, AIG wants to use this information for its private, personal gain in the Civil Case by seeking improperly to attack the reputations of the civil defendants, including CL and the CDR Parties, on the basis of unproven and untried allegations in a separate action. Indeed, the virtues of the common law right of access are undermined by AIG's attempt to resurrect dismissed allegations that have no evidentiary value in the Civil Case or this proceeding.

Additionally, the privacy interests of individuals named in the sealed Indictment, who were never prosecuted, outweigh AIG's purported interests. The Court has "a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals." Smith, 776 F.2d at 1114 ("The individuals on the sealed list are faced with more than mere embarrassment. . . . [P]ublication of the list might

be career ending for some . . . [and] will inflict serious injury on the reputations of all."). Here, there are individuals and/or entities named in the sealed Indictment that were never prosecuted and whose privacy interests are at stake. Privacy interests can outweigh even legitimate claims to release otherwise public court documents. Id. at 1113. Disclosure of allegations against individuals named in the sealed Indictment who were never prosecuted could cause serious reputational harm. As the Government explains in its opposition, "the procedural posture of this case (the bulk of the charges in the Original Indictment dismissed, and no proceedings having been conducted on it) leaves these individuals without any forum in which to exonerate or explain themselves if the Original Indictment is unsealed." Government's Opp'n at 19. Accordingly, given the risk of serious reputational injury, the privacy interests of others (who have received no notice or been afforded any opportunity to be heard) greatly outweigh AIG's weak personal justification for seeking access to the sealed Indictment.

In sum, the articulated privacy interests and public interest in respecting bargained-for binding plea agreements outweigh AIG's self-serving request for expansive discovery of irrelevant and inadmissible information in the sealed Indictment. Accordingly, AIG's Motion should be denied.

IV.

CONCLUSION

For the above reasons, the Court should deny AIG's Motion to Unseal Indictment.

Respectfully submitted,

Dated: August 8, 2011

WHITE & CASE LLP

By: */s/ Fernando L. Aenlle-Rocha*
Fernando L. Aenlle-Rocha

Attorneys for Consortium de Réalisation S.A. and CDR Entreprises, formerly known as Altus Finance S.A.

Dated: August 8, 2011

CLEARLY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Avram E. Luft*
Avram E. Luft

Attorneys for Crédit Lyonnais S.A.